

## CHAPTER VIII – PARTICIPANT RIGHTS AND APPEAL AND GRIEVANCE PROCESSES

### Applies to **BIW, CLTS, CIP 1A/B, and CIP II/COP-W and COR Waivers**

#### 8.01 Medicaid Waiver Applicant/Participant Rights

Persons applying for the Medicaid waiver programs and persons participating in those programs have specific rights. These rights are enumerated in federal and state statutes and rules and are reflected in this Manual. Waiver participants may also have other rights related to receiving services. These may be associated with the target group to which they are assigned (e.g. people with developmental disabilities and others have rights under S.51.61 Wis. stats. and HFS 94) and/or because they are served by a specific type of provider (e.g. CBRF residents have rights under S.50.09 Wis. stats.). While these other rights may apply to the waiver agency and its providers, they are monitored and enforced by other State and/or local agencies. Waiver applicants and participants also have specific responsibilities they must fulfill as a condition of participation in the Medicaid waivers.

The Medicaid waiver programs are a part of a long-term support model in Wisconsin, which includes federal Medicaid-funded and state-funded programs and services. Because of this combination of funding sources, it is important to provide applicants/participants with notification of a broader range of rights and responsibilities than only those rights prescribed by Medicaid. Please refer to:  
<http://dhs.wisconsin.gov/forms/F1/F10150.pdf>.

Certain rights granted to Medicaid waiver participants require county waiver agencies to take specific actions or create specific processes. These include the right of every waiver participant to be given written notification her/his rights, including the right to contest **certain waiver agency and provider** decisions, actions or omissions using **either the waiver appeal and hearing process and/or the grievance process described in HFS 94**. **Appendix M** of this manual contains the Model Waiver Rights and Responsibilities Notification form waiver agencies must use. Waiver agencies must modify this form providing specific local grievance contact information unique to the local agency.

#### 8.02 Responsibility for the Notification of Rights

It is the responsibility of the waiver agency to inform all Medicaid waiver applicants and participants of their rights including the right to appeal waiver agency decisions or to file a grievance about certain provider decisions with which they disagree. Notification must be given both verbally **and** in writing using the department's prescribed format. Agencies are required to inform applicants/ participants of their rights at the time of the application and not less than annually thereafter. The explanation must be provided to all applicants

and participants or to their guardians in a manner they can understand. For some persons this may mean the notice will need to be translated verbally or in writing to Spanish, Hmong, Russian, or another language. Or, the notice may need to be provided in Braille to people with visual impairments or signed to someone who is deaf/hearing impaired. The waiver agency is responsible for providing translators or translated text notification. The Bureau of Long Term Support may be contacted for assistance to obtain translated copies of the written notification.

**A. Appeals and Grievance Process: Notification**

Medicaid waiver applicants and participants must be notified about and fully informed about both the county grievance and the state appeals processes, including whom to contact and the time limits for appeals. Information provided must include the name and address of the Wisconsin Department of Administration, Division of Hearings and Appeals. Information on the County and State grievance process required under S.51.61 Wis. Stats and HS 94 should also be included for those waiver participants covered by those rights and that process.

The notice must also inform the person of her/his right to contact the Board on Aging and Long Term Care, Ombudsman Program and Disability Rights-Wisconsin (formerly Wisconsin Coalition for Advocacy) for assistance and include the agency addresses and toll free telephone numbers. Waiver agencies are required to use the language in the Model Rights Notification located in **Appendix M** of this Manual. The waiver agency must add the unique local contact information required by the form.

**Notice shall be given when the following agency actions occur:**

1. Decision to Provide an Assessment or Service Plan

Except in an emergency, the waiver agency must notify the applicant within thirty (30) calendar days from the date of application of the approval of an assessment and when the assessment will be conducted. An applicant who is approved for an assessment has the right to have that assessment conducted within forty-five (45) calendar days of application. In an emergency situation the applicant must receive a direct contact (by telephone or face to face) within 72 hours of the application or referral and an assessment must be conducted within ten (10) days of any nursing home admission. The Community Options Guidelines, (Appendix F), contains the definition of an emergency.

2. Denial of the Assessment

The agency must notify the applicant within thirty (30) calendar days if the applicants request for an assessment is denied. The notice of denial must include the reason for the denial, the procedure to follow to appeal the decision, the identity and contact information of the person with whom the participant must initiate the appeal and whom the participant may contact for assistance in the appeal process.

### 3. Assessment Results

Upon completion of the assessment, the agency must notify the applicant within thirty (30) calendar days of the decision to approve or deny the development of a service plan. If the applicant is denied, the notice must contain information describing the applicant's appeal and grievance rights and a listing of whom to contact to initiate the appeal and whom they may contact for assistance with the appeal process.

### 4. Reduction or Termination of Services

The waiver agency may not reduce or terminate services to a Medicaid waiver participant without providing the participant with prior written notice. The notification shall be given at least ten (10) days in advance of any reduction or termination of any waiver-funded service or services. The participant must be informed that s/he has the right to appeal the agency decision and, if the appeal is filed within the ten (10) day notice period, the services may not be reduced or terminated until the appeal is heard. The participant must also be informed that s/he has forty-five (45) days to appeal the agency decision and that appeals received after 45 days may not be heard.

The notice must inform the participant that if s/he requests a hearing regarding a reduction or termination of services action certain Medicaid rules apply. If the affected services continue pending the hearing decision, and the hearing decision upholds the action to reduce or terminate services, s/he may be required to reimburse the Department for the cost of any affected services. This recoupment possibility applies to services s/he received during the time period beginning on the original effective date of the notice, up to and including the date of the hearing decision.

The notification shall contain the address and telephone number of the Division of Hearings and Appeals as well as the addresses and telephone numbers of agencies to contact who will assist the participant in the appeal. If requested, the agency care manager/support and service coordinator must assist the participant to file his/her appeal and to contact appropriate advocacy agencies.

### 5. Termination of Program Participation

The waiver agency may not terminate participation in the waiver program without providing the participant with appropriate **written notice**. The notice shall be given at least **ten** calendar days in advance of the effective date of the agency action.

If termination of participation is occurring due to a loss of Medicaid eligibility, the effective date of the waiver program termination **may not occur earlier** than the effective date of Medicaid termination.

If termination of participation is occurring due to a loss of waiver functional or non-financial eligibility and the participant retains their Medicaid eligibility, the waiver termination date **may not occur earlier** than ten calendar days from the date of the notification.

If termination of participation is occurring due to a loss of waiver functional or non-financial eligibility and, due to this loss of program eligibility, the participant also loses their Medicaid eligibility, the waiver termination date **may not occur earlier** than the effective date of Medicaid termination.

### **8.03 Waiver Agency Actions Subject to Appeal or Grievance**

The following are all of the possible actions and decisions a waiver agency may make that are subject to appeal via a fair hearing by the Department of Administration's Division of Hearings and Appeals. Whenever a waiver agency takes one of these actions, the agency is required to notify an applicant, in the situations that apply to applicants and a participant and his/her guardian, if any, of the action being proposed, the reasons the action is being taken and inform the participant of his/her right to file an appeal or grievance contesting the waiver agency's decision prior to the decision being implemented.

With one exception, the grounds or basis for the waiver agency's action or decision do not affect whether the waiver applicant or recipient is entitled to a fair hearing before DHA to contest the action or decision. The sole exception is that a recipient is not entitled to a fair hearing if the only issue in the fair hearing would be a federal or state law that requires an automatic change that adversely affects some or all recipients, 42 CFR sec. 432.220(b). Otherwise, federal law entitles waiver applicants and recipients to fair hearings to contest the actions and decisions identified below regardless of the waiver agency's reason for the action or decision.

#### **Actions and decisions that are subject to appeal:**

##### **1. Denial of the Assessment**

If a request for an assessment is denied, the waiver agency must notify the applicant of the decision within 30 days of the application. The denial of an assessment is subject to appeal to the Division of Hearings and Appeals.

##### **2. Denial of Eligibility**

Any denial of applicant eligibility is subject to appeal and a fair hearing conducted by the Division of Hearings and Appeals.

##### **3. Termination of Eligibility**

Any proposed termination of participant eligibility is subject to appeal and a fair hearing conducted by the Division of Hearings and Appeals.

**4. Termination of Waiver-Covered Services**

Any proposed termination of any waiver-covered service for any reason is subject to appeal and a fair hearing conducted by the Division of Hearings and Appeals. Services listed in service plans but not funded by the Waiver are not waiver covered services.

**5. Reduction of Waiver-Covered Services**

Any proposed reduction in a waiver covered service for any reason is subject to appeal and a fair hearing conducted by the Division of Hearings and Appeals

**6. Choice Between Institutional and Community Services**

Any failure to give people choice between institutional and community services is subject to appeal and a fair hearing conducted by the Division of Hearings and Appeals. This appeal right does not apply when a court has ordered community placement and services as the least restrictive and/or most integrated service. The right to a hearing on this subject is required by CMS under 42 CFR Part 431, subpart E, and State Medicaid Manual sec. 4442.7.B, which provides that a State operating a HCBS waiver program must provide an opportunity for a fair hearing to beneficiaries who are not given the choice of home and community-based services as an alternative to hospital, nursing home, or ICF/MR services.

**7. Choice of Type of Service**

Any failure to give people a choice between different types of waiver allowable community services when the cost of the services are equivalent is subject to appeal and a fair hearing conducted by the Division of Hearings and Appeals. This applies only when the different services are appropriate to the person's assessed needs and are capable of addressing the individual's desired outcomes. For example, if a person qualifies for and wishes to be served in a small adult family home vs. a larger CBRF and both address the person's needs and outcomes, the person must be given choice of waiver allowable items/services when the costs of both are equivalent. The right to a hearing on this subject is required by CMS under 42 CFR Part 431, subpart E, and State Medicaid Manual, sec 4442.7, which provides in part that a state operating a HCBS waiver must "provide and opportunity for a fair hearing... to beneficiaries... who are denied the service of their choice."

**8. Denial of Choice of a Qualified Service Provider**

Any failure to give waiver participants a choice between qualified providers when the cost of the services required to address the person's assessed needs and outcomes are equivalent is subject to appeal and a fair hearing conducted by the Division of Hearings and Appeals. The right to a hearing on this subject is required by CMS under 42 CFR Part 431, subpart E, and State Medicaid Manual, sec 4442.7, which provides in part that a state operating a HCBS waiver must "provide and opportunity for a fair hearing... to beneficiaries... who are denied the service of their choice."

**9. Denial of Waiver Coverage of an Item or Service**

Any decision by the waiver agency to deny or limit coverage of a requested service or item for any reason is subject to appeal and a fair hearing conducted by the Division of Hearings and Appeals. Under federal law, the State must grant an opportunity for a fair hearing to any person who requests it because his or her claim for services is denied, 42 CFR sec. 431.220(a)(1). Moreover, Wisconsin statutes afford the right to a fair hearing to any person who believes that waiver or other Medicaid payments made in the person's behalf have not been properly determined, Wis. Stat. sec. 49.45(5)(a).

**8.04 General Notice and Notification Requirements Associated with Waiver Agency Actions**

**A. Notification and Applicant/Participant Rights**

The notification and applicant/participant rights procedures **apply to all waivers**. If a determination is made to take any of the actions listed in Section 8.03, the agency shall give the applicant/participant and her/his guardian, if any, appropriate written notice of the decision. Appropriate notice shall clearly state all of the following:

1. What action the agency intends to take;
2. The effective date of the agency action;
3. The specific regulation supporting the agency's action;
4. The reasons the agency is taking the action;
5. Information describing the applicant's state appeal and county grievance rights that clearly states that the participant has the right to request a hearing from the state Division of Hearings and Appeals;
6. A statement that the applicant/participant has forty-five (45) days to file a grievance concerning a provider or waiver agency decision and that a hearing requested after 45 days may not be heard.
7. The notice must be given at least 10 days before the date of action and include a statement that if the participant requests a hearing before the date of action, the agency may not terminate or reduce services until after the hearing and after a decision is rendered.
8. A statement that the participant may also have access to the county grievance process under HFS 94 (Patient Rights) and other grievance provisions where these apply.

9. A statement that informs the participant that pursuing a county grievance or requesting an appeal under HFS 94 may not affect the date of termination or reduction of services.
10. A statement informing the participant that if s/he does request a hearing and the affected services continue pending the hearing decision and a hearing decision upholds the action to reduce or terminate services, that the participant may be required to reimburse the Department. Recoupment may be sought for the cost of any affected services s/he received during the time period beginning on the original effective date of the notice up to and including the date of the hearing decision.
11. Information about the person or office which the applicant or participant must contact to initiate the appeal or grievance; and
12. Contact information on people and agencies that they may contact for assistance.

**Important:** In some circumstances an agency action may affect a participant's Medicaid eligibility. The waiver agency care manager/support and service coordinator must promptly notify the county income maintenance staff of any change in the participant's waiver program eligibility status. The care manager/support and service coordinator and income maintenance staff must then work together to ensure proper notification requirements are met.

### 8.05 Participant Rights: Restrictive Measures

Wisconsin's Community-based long term support system is based on the principles of respect, dignity, community integration, consumer participation and choice. The waiver gives people the opportunity to live in the community, including people who may exhibit dangerous and challenging behavior or who may have complex medical needs. The Medicaid Waivers covered in this Manual support and promote these principles by providing community living opportunities that are safe and free from the use of restrictive measures to the extent possible.

Most of the participants<sup>1</sup> who are served by the waiver are covered by the provisions in s.51.61 Wis. Statutes giving people the right to be free of restraints. Others not covered by that statute are protected by the Wisconsin elder-adults/adults-at-risk laws (Wis. Stats s.46.90 (1) (a) 5.) which provides protection from the use of unreasonable confinement or restraint by including restraint under the definition of abuse. "Unreasonable confinement or restraint" includes the intentional and unreasonable confinement of an individual in a locked room, involuntary separation of an individual from his or her living area, use on an individual of physical restraining devices, or the provision of unnecessary or excessive

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<sup>1</sup> Includes persons who met the definition of "patient" in s.51.61 (1) Wis. Stats. Includes all participants of the CIP I and COP Waivers, Children served in the CLTS- DD and MI Waivers and adults who are served by CIP II or COP-W waiver and who are protectively placed. .

medication to an individual, but does not include the use of these methods or devices in entities regulated by the department if the methods or devices are employed in conformance with state and federal standards governing confinement and restraint.

In most circumstances, there are alternative ways of addressing a behavior or managing a perceived risk. The use of restrictive measures can often be reduced or eliminated if services are assessment-guided and managed by a person-centered, individualized behavior or crisis support plan. **It must be clear however, that restrictive measures may not be used as part of an intervention plan or in an emergency, unless there is imminent harm or risk to the person or others.** It is the intent of the department to provide direction to local agencies and service providers and to assure that the use of restrictive measures in the community will be carefully considered and closely monitored.

For a waiver participant covered by s.51.61 Wis. Stats and HFS 94 including HFS 94.10, information and materials on the application and approval process for the use of restrictive measures are provided in Appendix R. Separate guidelines have been developed for different target groups.

#### 8.06 **Additional Rights Provisions**

Waiver agency staff should be aware of additional rights and protections which may apply. Please see the following department resource: <http://dhs.wisconsin.gov/clientrights/>